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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF)

NEXTIRAONE, LLC)

PETITION FOR WAIVER OF SECTION 54.521)
OF THE COMMISSION'S RULES)

DOCKET No. 02-6

TO: THE COMMISSION

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Federal Communications Commission
Office of Secretary

PETITION FOR WAIVER

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TABLE OF CONTENTS

I. NEXTIRAONE’S PARTICIPATION IN THE E-RATE PROGRAM	2
II. THE PLEA AGREEMENT AND SETTLEMENT	4
III. THE EXTRAORDINARY MEASURES TAKEN BY NEXTIRAONE OVER THE PAST THREE YEARS JUSTIFY WAIVER OF THE DEBARMENT RULE	5
A. NextiraOne Has Fully Cooperated with the Government’s Investigation.....	5
B. NextiraOne Assumed Responsibility for Its Actions and Took Swift Remedial Action	8
C. NextiraOne Voluntarily Ceased Its Participation in the E-Rate Program and Has No Plans to Resume Participating	10
D. NextiraOne Will Be Acquired By a Company with No Involvement in Its Prior E-Rate Activities.....	11
E. Grant of the Requested Waiver Will Serve the Public Interest	12
IV. CONCLUSION	17

SUMMARY

NextiraOne, LLC (“NextiraOne”) respectfully petitions for waiver of the suspension and debarment provisions of Section 54.521 of the Commission’s rules, and further requests that the Commission toll any suspension of NextiraOne under the rules pending a final decision on this Petition.

Extraordinary circumstances justify grant of this request. From the inception of a government investigation into its E-rate-related activities, NextiraOne maintained a consistently cooperative posture. The details of that cooperation have been confirmed by the Department of Justice. NextiraOne’s cooperation will not cease with the entering of the Plea Agreement; the company has made a commitment to continue to fully cooperate with the government in this matter and in other federal proceedings.

NextiraOne has taken full responsibility for the actions of its former employees, including actions that occurred prior to formation of the company. NextiraOne has resolved criminal and civil claims related to those actions. Since learning of the government’s investigation, NextiraOne and Platinum, NextiraOne’s parent, have made substantial efforts to ensure that the integrity of the E-rate Program is not compromised, including voluntarily suspending NextiraOne’s participation in the E-rate Program.

In sum, debarment of NextiraOne is not necessary to serve the purposes of applicable Commission rules and policies. NextiraOne has taken extraordinary measures, consistent with the public interest, to protect the integrity of the E-rate Program. Those extraordinary measures constitute mitigating factors under the federal governmentwide nonprocurement debarment regulations. Debarment would serve only to punish the company and would fail

to promote important government objectives. Accordingly, NextiraOne submits that good cause exists for the requested waiver.

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TO: THE COMMISSION

PETITION FOR WAIVER

NextiraOne, LLC ("NextiraOne" or "the Company"), by its attorneys and pursuant to Section 1.3 of the rules of the Federal Communications Commission ("FCC" or "Commission"), respectfully petitions for waiver of the suspension and debarment provisions of Section 54.521 of the Commission's rules, 47 C.F.R. § 54.521, and further requests that the Commission toll any suspension of NextiraOne under the rules pending a final decision on this Petition.

As the facts discussed herein demonstrate, there exist extraordinary circumstances such that debarment of NextiraOne is not necessary to protect the integrity of the E-rate Program and serve the purposes of applicable Commission rules and policies. Indeed, because NextiraOne already has taken extraordinary measures to protect the integrity of the E-rate Program, debarment would unnecessarily punish the Company and fail to promote important government objectives. Accordingly, NextiraOne submits that good cause exists for the requested waiver.

I. NEXTIRAONE'S PARTICIPATION IN THE E-RATE PROGRAM

NextiraOne is a limited liability company organized and existing under the laws of Delaware with its principal place of business in Houston, Texas. The events related to this Petition arose out of the Company's participation in the Schools and Libraries mechanism of the federal Universal Service Fund (the "E-rate Program").

The Company was formed in April 2001 when Platinum Equity, LLC ("Platinum") acquired and integrated two existing companies, Williams Communications Solutions, LLC ("WCS") and Milgo Solutions, LLC, creating a new entity called Nextira LLC. In October 2001, Nextira LLC changed its name to NextiraOne, LLC.

At the time of its acquisition by Platinum, WCS participated in the E-rate Program as a service provider, having sold internal connections to schools and libraries for E-rate Funding Years 1-4. As part of an internal reorganization of the legacy WCS business after its acquisition by Platinum, a new group, the Strategic Technology Consulting Practice ("STCP"), which included persons who had been involved in WCS's E-rate business, was established to focus on private commercial markets. A new E-rate consulting unit of the STCP was created during the fourth quarter of 2001 and launched officially during the first quarter of 2002. The Company then began to charge customers for educational consulting services.

In late 2002, NextiraOne learned that a Grand Jury investigation had been commenced concerning matters related to WCS's and NextiraOne's involvement in the E-rate Program, in particular the activities of individuals in the STCP. Certain actions that were being investigated occurred within WCS prior to its acquisition by Platinum. NextiraOne responded by fully and voluntarily cooperating with the investigation, and

immediately began an internal review of its E-rate business and practices. NextiraOne also voluntarily suspended its E-rate sales activities.

With the benefit of hindsight, the inclusion of an E-rate consulting business within the STCP clearly was ill-advised. Created to focus on private commercial markets, the STCP initiated the practice of charging the Company's E-rate customers for educational consulting services. The practices that developed during 2001-2002 were attributable, directly or indirectly, to the role of the STCP in these transactions.

At all times during the events described in this Petition, NextiraOne has been a large company, having more than 1,000 employees throughout the United States, with the vast majority of its revenues derived from business wholly unrelated to the E-rate Program. At no time have there been any allegations that NextiraOne Federal, LLC, a subsidiary of NextiraOne which operates as a separate company providing network services to government customers, or any other subsidiary or affiliate of NextiraOne or Platinum, had any involvement in the activities described herein.

NextiraOne has taken full responsibility for the actions of its former employees, including actions that occurred prior to the formation of the Company. As discussed below, NextiraOne has resolved criminal and civil claims related to those actions. In addition, and as discussed in greater detail below, since learning of the government's investigation, the conduct of NextiraOne and of Platinum, NextiraOne's parent, has been exemplary; they have made substantial efforts, including voluntarily suspending the Company's participation in the E-rate Program, to ensure that the integrity of the E-rate Program is not compromised.

II. THE PLEA AGREEMENT AND SETTLEMENT

NextiraOne has agreed with the Department of Justice to enter a plea of guilty to one count of wire fraud in violation of 18 U.S.C. § 1343, and to pay a criminal fine of \$1,818,380 in connection with the Company's participation in the E-rate Program. The plea is expected to be entered shortly in a matter captioned *United States of America v. NextiraOne, LLC*, No. CR 06-____, in the federal District of South Dakota, Southern Division (the "Plea Agreement").

In addition, NextiraOne has agreed to enter into a Settlement Agreement with the United States, acting through the Department of Justice and on behalf of the FCC (the "Settlement Agreement"), pursuant to which the Company will compensate the United States in the amount of \$2,678,000 and will agree to release the United States, including the FCC and the Universal Service Administrative Company ("USAC"), from any obligation to pay certain pending requests for E-rate funding for uncompensated work performed by NextiraOne or its subsidiaries or affiliates.

The Company also has entered into an agreement with the Oglala Nation Education Coalition ("ONEC"), to resolve claims that it or its affiliated schools may have had against NextiraOne regarding the participation of ONEC and NextiraOne and/or WCS, in the E-rate Program.

III. THE EXTRAORDINARY MEASURES TAKEN BY NEXTIRAONE OVER THE PAST THREE YEARS JUSTIFY WAIVER OF THE DEBARMENT RULE

The purpose of the Commission's debarment rules is to protect the integrity of the E-rate Program.¹ Where extraordinary circumstances exist, the Commission may refrain from imposing the ultimate sanction of suspension and debarment from the E-rate Program.² As shown below, not only is debarment not necessary to achieve the objectives of the Commission's rules, but those goals already have been achieved by the extraordinary measures NextiraOne has taken; consequently, suspension and debarment would serve no purpose other than to punish the Company and would be contrary to the public interest.

A. NextiraOne Has Fully Cooperated with the Government's Investigation

As noted above, once it learned of the government's investigation, NextiraOne not only committed to fully and truthfully cooperate with that investigation, it also immediately undertook its own extensive and costly internal review of its E-rate activities. That review ultimately encompassed the review of hundreds of boxes of hard copy and electronically-stored corporate records of dozens of record custodians, and in-person or telephonic interviews of dozens of employees. As a result of these efforts, NextiraOne identified to the government numerous individuals as potential material witnesses.

A primary focus of the Company's internal review involved equipment and services furnished to the Oglala Nation Education Coalition ("ONEC") and, in particular, the extent to which E-rate funding was obtained for ineligible products or services provided to ONEC

¹ *In the Matter of Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 9202, 9225 (2003) ("E-Rate Second Report and Order").

² See 47 C.F.R. §§ 54.521(b), (c).

as well as to other schools. With respect to ONEC, the Company determined that a complete review of contracts and invoices would be needed in order to attempt to quantify the amounts of invoices submitted to the Schools and Libraries Division (“SLD”) of USAC for ineligible items, and the attendant funds received by the Company. To that end, NextiraOne undertook to compile the relevant information and to trace and inspect all equipment provided at each ONEC site. As the magnitude of this labor-intensive undertaking became clear, the Company engaged an independent forensic consulting firm to perform a best-efforts financial analysis. Based on a comparison and analysis of the Company’s ONEC-related network designs, expenditures for those designs, price quotes, job change orders, payment records and related documentation, physical inventory of installed equipment, the Eligible Services List and other information available on the SLD’s web site, and discussions with Company operations personnel and others, the consulting firm was able to assess and confirm the Company’s preliminary determinations of eligible equipment and services. A report completed by the forensic consulting firm described the process by which it attempted to calculate the amount of SLD disbursements in excess of eligible services or equipment.

Ultimately, based on its internal review, NextiraOne determined that although it certainly provided significant and substantial services and value to ONEC, and to many other E-rate applicants, portions of those services were not eligible for reimbursement under the E-rate Program but nonetheless had been included on invoices submitted to the SLD for reimbursement.

From the inception of the government’s investigation, the Company maintained a consistently cooperative posture and kept the government apprised of its internal review.

In addition to producing the original hard copy and electronically-stored corporate records that the government requested, NextiraOne compiled and voluntarily disclosed detailed synopses of the evidentiary record along with the reports generated by the forensic accounting firm, and provided substantial detail about ineligible services and other matters. NextiraOne also made its employees available to discuss with the government the Company's E-rate activities.

Importantly, NextiraOne's cooperation will not cease with the entering of the Plea Agreement, but rather will be ongoing. The Company has committed, in both the Plea Agreement and the Settlement Agreement, to continue to fully and truthfully cooperate with the government in this matter and in current federal investigations of E-rate matters and related litigation or other proceedings.

NextiraOne's cooperation with the government's investigation of its E-rate related activities stands as a significant factor supporting a waiver of the Commission's debarment rule. Significantly, the Department of Justice does not favor debarment under these circumstances. Citing its substantial experience with other federal agencies' debarment policies, the Department has stated that "companies that provide timely and valuable cooperation are routinely spared from debarment in order to both reward their decision to cooperate and to encourage other companies to follow their course."³

³ Letter from James M. Griffin, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, to Marlene H. Dortch, Secretary, Federal Communications Commission, August 5, 2004, In Re NEC-Business Solutions.

B. NextiraOne Assumed Responsibility for Its Actions and Took Swift Remedial Action

NextiraOne is firmly committed to regulatory compliance in all facets of its business. Regrettably, the creation and operation of an E-rate consulting unit within the STCP was not consistent with corporate policy. The business practices at issue were undertaken without even the knowledge of, much less the endorsement by, the Company's control group during the relevant period.

NextiraOne believes that its response, upon learning of the investigation, sets a very high standard of behavior for corporate organizations facing allegations of misconduct involving a business unit or division or particular employees. In the very early stages of its internal review, NextiraOne dismantled the STCP, reorganized its sales force, terminated or laid off employees – including all of those determined to be involved with the activities under investigation – and implemented a number of compliance measures, including adopting a Code of Conduct and Business Ethics and a document retention policy, and establishing an internal compliance hotline available to all employees. Since May 2003, the Company has been led by new management. Under their leadership, NextiraOne has devoted extraordinary resources to evaluating its prior E-rate transactions and attempting to remedy the problems that had occurred as a result of the Company's E-rate activities.

The remedial actions undertaken by NextiraOne are similar to those the Commission considered exceptional when it allowed the Puerto Rico Department of Education

("PRDOE") to continue participating in the E-rate Program.⁴ In the *PRDOE Order*, the Commission concluded that, notwithstanding the conviction of the former Secretary of Education for Puerto Rico, the PRDOE "ha[d] taken sufficient action to ensure that the prior issues have been addressed and will not occur again,"⁵ thereby furthering the purpose of the Commission's debarment rule. The PRDOE's actions included undertaking an internal review, hiring an outside consultant, changing management, cooperating with federal investigations and audits, and adopting and implementing ongoing compliance measures.⁶ The Commission did not debar the PRDOE, but rather allowed it to continue to participate in the E-rate Program, noting as a critical factor that the E-rate activities of PRDOE being investigated occurred in prior Funding Years.⁷

Thus, in the *PRDOE Order*, the Commission treated as severable the PRDOE's conduct during the period encompassed by ongoing investigations, and the subsequent period during which the PRDOE undertook remedial measures and there were no new allegations of wrongdoing.⁸ This approach is entirely consistent with the purposes of the debarment rule and should be followed here. In the more than three years that have passed since the government began its investigation of NextiraOne, there have been no allegations of wrongdoing involving E-rate or any other activities by the Company.

⁴ See *Petition of the Puerto Rico Department of Education to Release Funds Associated with the Schools and Libraries Universal Service Support Mechanism for Years 2001 and 2002*, CC Docket No. 02-6, 18 FCC Rcd 25417, 25423 (2003) ("*PRDOE Order*").

⁵ *Id.*

⁶ See *id.* at 25420-25422.

⁷ *Id.* at 25424.

⁸ *Id.* at 25425.

As the Commission stated when it adopted the debarment rule, “it is vital to the integrity of the program that there are sufficient procedural safeguards to ensure accountability.”⁹ Together, the actions undertaken by NextiraOne since it became aware of the problems with its E-rate activities, and its ongoing commitments set forth in the Plea Agreement and the Settlement Agreement, constitute such safeguards. NextiraOne’s post-investigation conduct may serve as the benchmark for companies that face similar circumstances in the future and strive to comply fully with all applicable laws and rules while cooperating to remedy past mistakes.

C. NextiraOne Voluntarily Ceased Its Participation in the E-Rate Program and Has No Plans to Resume Participating

Shortly after learning of the government’s investigation and initiating its internal review, Company management determined to eliminate the E-rate segment of the STCP. NextiraOne’s representatives thereafter met with the SLD to apprise it of this decision; ultimately, NextiraOne identified pending requests for funding that it believed included ineligible STCP services and were pending before the SLD, and did not pursue reimbursement for those requests.

Along with dismantling the STCP, NextiraOne also chose not to pursue any new E-rate-related business. This voluntary decision not to participate in the E-rate Program is in its fourth Funding Year, including the current Funding Year. For Funding Year 6 (2003-04), NextiraOne submitted no invoices and relinquished claims to reimbursement for outstanding funding requests. For E-rate Funding Years 7, 8, and 9 (i.e., 2004-05, 2005-06,

⁹ *E-Rate Second Report and Order*, 18 FCC Rcd at 9224.

and 2006-07), NextiraOne did not submit a bid to perform E-rate funded services to any school or library, performed no new services for any potential or actual E-rate applicant, and did not request or receive any E-rate funds. In short, NextiraOne has conducted no activities associated with or related to the schools and libraries support mechanism for at least three years.¹⁰

NextiraOne took the extraordinary measure of effectively suspending itself from the E-rate Program for the duration of the government's investigation – *longer* than the three-year period to which persons are subject to debarment under the Commission's rules. Furthermore, NextiraOne has no current intention to resume participating in the E-rate Program.¹¹ The Company is aware of no other entity or individual that, like NextiraOne, chose to eliminate its E-rate business even after implementing remedial measures like those adopted by NextiraOne.

D. NextiraOne Will Be Acquired By a Company with No Involvement in Its Prior E-Rate Activities

Platinum has executed an agreement with Black Box Corporation ("Black Box") for the acquisition of the Company. Black Box is a publicly traded company based in Lawrence, Pennsylvania, that is the world's largest technical services company dedicated to designing, building, and maintaining data and voice infrastructure systems. Black Box serves more than 150,000 clients in 141 countries throughout the world. Black Box intends

¹⁰ See 47 C.F.R. § 54.521(a) (defining such activities to include the receipt of funds or discounted services through the schools and libraries support mechanism, or consulting with, assisting, or advising applicants or service providers regarding the schools and libraries support mechanism).

¹¹ In the event NextiraOne wishes to participate in the E-rate Program in the future, it has agreed to implement specific compliance and oversight measures – including giving prior written notice to the Commission and making certain disclosures to the Commission's Office of Inspector General – that will ensure the Company operates in full compliance with applicable rules and procedures. These commitments are set forth in the Plea Agreement.

to acquire the U.S. and Canadian commercial operations and U.S. government operations of NextiraOne. These operations service NextiraOne's commercial accounts, which, as noted above, have not included any E-rate business for several years, as well as NextiraOne's substantial government agency accounts. Black Box had no involvement in the E-rate related activities of NextiraOne. Thus, upon the consummation of a transaction involving the two companies, the actions of the former employees of NextiraOne whose conduct led to NextiraOne's conviction will be even further removed from the Company's new corporate management.

The Commission also should take into account that, as expressly stated in the Plea Agreement, NextiraOne Federal, LLC ("Nextira Federal"), a subsidiary of NextiraOne, had no involvement in the activities described in the Plea Agreement. As a subsidiary of NextiraOne, Nextira Federal is not subject to debarment under the Commission's Rules. *see* 47 C.F.R. §54.521(d). Black Box and its affiliates, of course, also are not subject to 47 C.F.R. §54.521(d). Following the acquisition of the Company by Black Box, Nextira Federal will cease to be a subsidiary of, and will not share common management with, NextiraOne. The change of control of the Company and the fact that its subsidiary had no involvement in the actions that lead to the Plea Agreement further supports waiver of the debarment rule.

E. Grant of the Requested Waiver Will Serve the Public Interest

When it adopted its debarment rule, the Commission stated that the purpose of the rule is not to punish but rather to protect the integrity of the E-rate Program by preventing

“bad actors” from receiving benefits associated with the Program.¹² As described above, NextiraOne has acted consistent with the purpose of the rules by identifying the individuals and events related to the government’s investigation and promptly taking remedial action. The Company has made every effort to ensure that “bad actors” have not benefited from their actions, and took the additional extraordinary step of voluntarily deciding not to continue with any activities associated with or related to the schools and libraries support mechanism.

The Commission’s debarment rule is “inform[ed]” by federal governmentwide nonprocurement debarment regulations.¹³ In fact, the provisions of the Commission’s debarment rule are nearly identical to the governmentwide debarment regulations, but the latter are far more comprehensive. The governmentwide nonprocurement debarment regulations expressly permit a debarring official to consider from among eighteen specific “mitigating factors” in determining whether to debar a person.¹⁴ A debarring official also may consider “other factors if appropriate in light of the circumstances of a particular case.”¹⁵ Based upon an analysis of these factors, a debarring official “need not debar ...

¹² *E-Rate Second Report and Order*, 18 FCC Rcd at 9225. The debarment rules of the Department of Justice state that debarment “*shall be used only in the public interest and for the Federal Government’s protection and not for purposes of punishment.*” 28 C.F.R. § 67.115(b) (emphasis added).

¹³ Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants), 68 Fed.Reg. 66534 (Nov. 26, 2003). The Commission has not yet adopted those regulations, which took effect on November 26, 2003, but has requested comment on whether it should do so. *In the Matter of Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, *Second Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 9202, 9236 (2003).

¹⁴ 68 Fed.Reg. at 66554 (§ __.860(a)-(r)).

¹⁵ *Id.* (§ __.860(s)).

even if a cause for debarment exists.”¹⁶ Consistent with these governmentwide nonprocurement debarment regulations and with the public interest, the Commission in addressing this Petition should consider these mitigating factors as “extraordinary circumstance” under Section 54.541(b).

Among the factors that may be considered when making a debarment decision under the governmentwide regulations are:

- Whether the company has accepted responsibility for the wrongdoing and recognizes the seriousness of the misconduct that led to the cause for debarment.
- Whether the company has cooperated fully with government agencies during the investigation.
- Whether the company has paid or agreed to pay criminal, civil and administrative liabilities for the improper activity, and made or agreed to make full restitution.
- Whether the organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.
- Whether the company fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.
- Whether the company took appropriate disciplinary action against the individuals responsible for the activity which constitutes the cause for debarment.
- Whether the company has had adequate time to eliminate the circumstances within the organization that led to the cause for the debarment.¹⁷

¹⁶ *Id.* (§ __.845).

¹⁷ *Id.* (§ __.860).

Each of the above factors is answered in the affirmative in this Petition. Other factors that may be considered, and which are here answered in the negative, include whether there is a pattern or prior history of wrongdoing; whether the wrongdoing was pervasive within the organization; whether the company's principals tolerated the offense; whether the company has been excluded or disqualified by another federal agency, or has not been allowed to participate in State or local contracts, on the basis of conduct similar to the cause for debarment.¹⁸

As noted, the Commission has stated that its debarment rule is "informed" by these governmentwide debarment regulations, even if it is presently not bound by them. In the event that the Commission does not adopt the governmentwide debarment regulations prior to acting on this Petition, those regulations nonetheless should inform the Commission's decision. The purpose of the Commission's debarment rule, as well as other objectives of significance to the entire federal government, would be served by doing so.

Under the extraordinary circumstances presented, debarment would not serve the public interest. To the contrary, as the Department of Justice has stated in similar circumstances, a decision to debar cooperating companies would harm important government objectives, because "[if] these companies are deterred from making the decision to cooperate, not only will [the government's] investigation suffer but future

¹⁸ *Id.* Additional factors not specifically addressed here, but which were taken into account by the government in reaching the Plea Agreement and the Settlement Agreement, include the frequency of incidents and/or duration of the wrongdoing; the actual or potential harm; and the kind of positions held by the individuals involved in the wrongdoing. *Id.*

wrongdoing associated with the E-rate program may go undeterred and undetected to the detriment of schools and libraries across the country.”¹⁹

The remedial actions taken by NextiraOne and described herein are all that the public would expect of a responsible contractor faced with the discovery of wrongdoing by a group of its employees. The Company did not profit from that wrongdoing, has made restitution, and has taken steps to ensure that it does not recur. To debar the Company for the actions of those former employees, in light of the extraordinary measures the Company undertook and has committed to continue implementing, would work a manifest injustice and is contrary to the public interest.²⁰

¹⁹ Letter from James M. Griffin, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, to Marlene H. Dortch, Secretary, Federal Communications Commission, August 5, 2004, In Re NEC-Business Solutions.

²⁰ This Petition does not address the question of whether application of the Commission’s debarment rule to conduct that preceded the July 21, 2003 effective date of that rule would be lawful. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 216 (1988) (agencies may adopt rules “of future effect” only). NextiraOne reserves the right to address this question in the future.

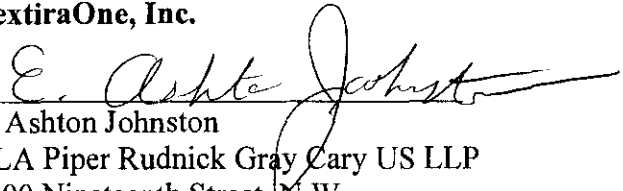
IV. CONCLUSION

NextiraOne submits that it has established the extraordinary circumstances necessary to avoid debarment, that good cause exists for a waiver of Section 54.521 of the Commission's rules, and that the public interest would be served by not debarring the Company from participation in the E-rate Program. Consequently, NextiraOne respectfully requests that the Commission grant the requested waiver, and further requests that the Commission toll any suspension of NextiraOne under the debarment rules pending a final decision on this Petition.

Respectfully submitted,

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April 14, 2006

CERTIFICATE OF SERVICE

I, Anthony Colleli, hereby certify that on this 14th day of April, 2006, a true and correct copy of the foregoing Petition for Waiver was sent via hand delivery, to the following:

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